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No. 20

In the Supreme Court of the United States

October Term, 1911

WILLIAM G. BENTON, PETITIONER

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRICKS FOR THE UNITED STATES

WILLIAM G. BENTON, PETITIONER

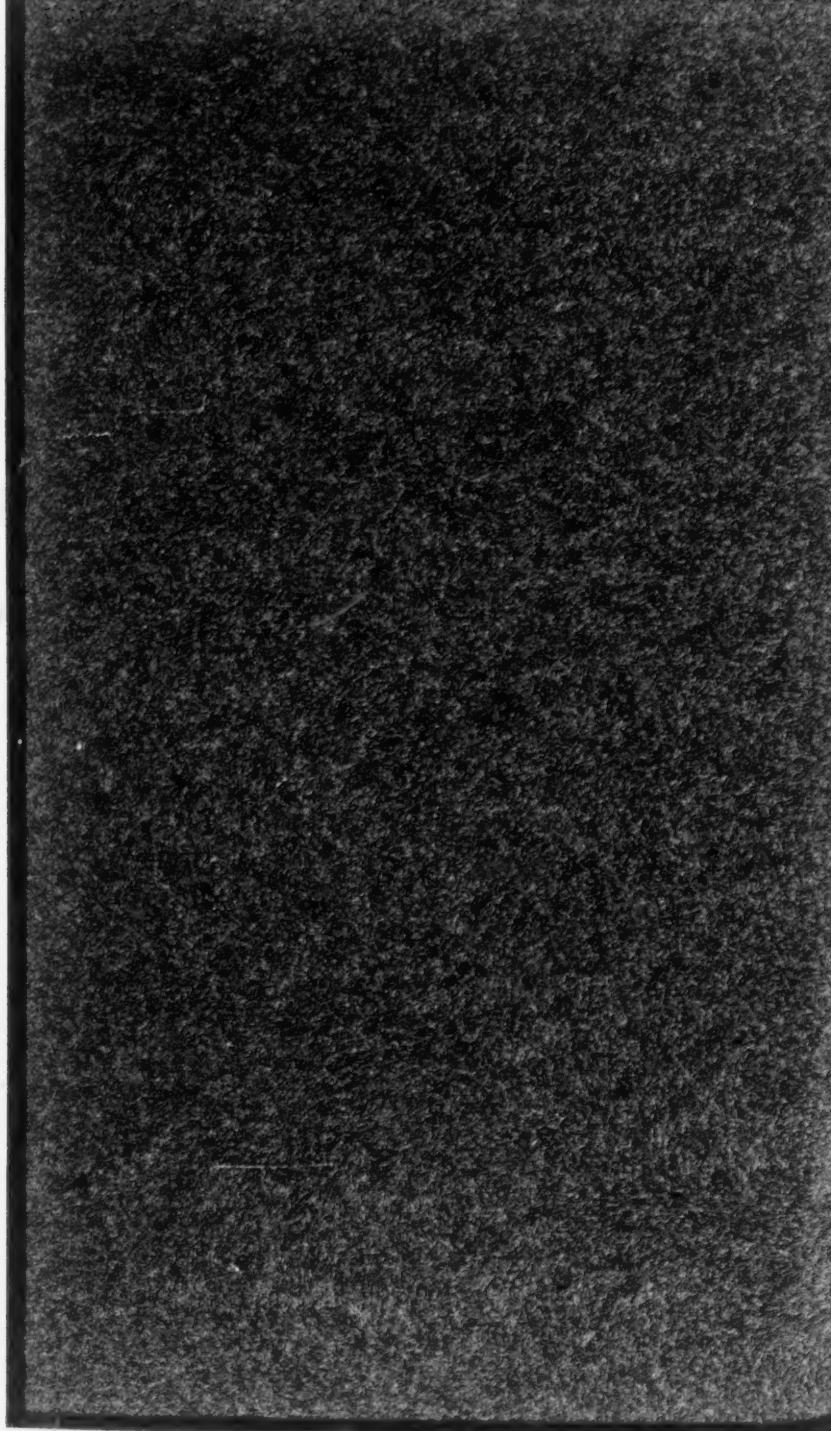


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In the Supreme Court of the United States.

OCTOBER TERM, 1911.

WILLIAM G. HANNUM, APPELLANT,

v.

THE UNITED STATES.

} No. 249

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

The appellant entered the naval service of the United States in 1872, and prior to the year 1900 attained the rank of lieutenant on the active list of the Navy of more than twenty years' service.

On October 22, 1900, upon the report of a retiring board that he was incapacitated for active service and that such incapacity was not the result of any incident of the service, the appellant was placed on the retired list of the Navy by the following order of the President:

EXECUTIVE MANSION,

October 22, 1900.

The proceedings and findings of the board in this case are approved, and Lieut. William

G. Hannum, U. S. Navy, will be retired from active service and placed on the retired list on furlough pay, in conformity with the provisions of section 1454 of the Revised Statutes.

WILLIAM MCKINLEY.

(Findings I and II, Rec., p. 3.)

It is provided by Revised Statutes, section 1593:

Officers placed on the retired list on furlough pay shall receive only one-half of the pay to which they would have been entitled if on leave of absence on the active list.

The pay of appellant at the time of his retirement as a lieutenant of more than twenty years' service in the Navy, under section 13 of the so-called Navy personnel act of March 3, 1899 (30 Stats., 1007), corresponded to that of a captain in the Army, not mounted, and was \$1,800 a year (R. S., sec. 1262), with 40 per cent longevity increase (secs. 1262 and 1263), amounting to \$2,520 a year, reduced by 15 per cent for duty on shore (sec. 13, act March 3, 1899, *supra*), making his total compensation on the active list when retired \$2,142.

Since his retirement (except for a short term of active duty in 1903 and 1904, in no way material to this controversy) the appellant has been paid one-half of the last-named sum, or at the rate of \$1,071 per year. (Findings III and IV, Rec., p. 3.)

On the 16th of October, 1906, or six years after his retirement, the appellant began this suit in the court below, contending that the method adopted for the computation of his pay on the retired list was erro-

neous, and that under the opening clause of section 13 of the personnel act providing that officers of the line of the Navy should receive the same pay and allowances as officers of corresponding rank in the Army, he was entitled to receive the same rate of pay on the retired list as an officer of corresponding rank and length of service in the Army, to wit, 75 per centum of the pay of the rank upon which retired (R. S., sec. 1274) less the amount already received, making a difference of \$819 per year, or a total of \$4,651.84 for the period claimed in the petition.

The Court of Claims held that the assimilating clause of section 13 applied only to officers on the active list of the Navy, and did not repeal or modify the prior law respecting the pay of that particular class of officers compulsorily retired for incapacity not resulting from any incident of the service, and dismissed the petition, whereupon the claimant appealed to this court.

II.

THE STATUTES.

Among the number entitled, "Statutes of possible application," set out in appellant's brief, pages 2 to 8, the following appear material to the issue in controversy:

THE NAVY.

Revised Statutes:

SEC. 1454. When said board finds that an officer is incapacitated for active service and

that his incapacity is not the result of any incident of the service, such officer shall, if said decision is approved by the President, be retired from active service on furlough pay, or wholly retired from service with one year's pay, as the President may determine.

SEC. 1593. Officers placed on the retired list, on furlough pay, shall receive only one-half of the pay to which they would have been entitled if on leave of absence on the active list.

SEC. 1594. The President, by and with the advice and consent of the Senate, may transfer any officer on the retired list from the furlough to the retired pay list.

THE ARMY.

Revised Statutes:

SEC. 1252. When the board finds that an officer is incapacitated for active service, and that his incapacity is not the result of any incident of service, and its decision is approved by the President, the officer shall be retired from active service, or wholly retired from the service, as the President may determine. The names of officers wholly retired from the service shall be omitted from the Army Register.

SEC. 1274. Officers retired from active service shall receive seventy-five per centum of the pay of the rank upon which they are retired.

NAVY PERSONNEL ACT, MARCH 3, 1899
(30 STAT. L., 1004).

SEC. 13. That, after June 30th, 1899, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law, for the officers of corresponding rank in the Army:

*Provided,*¹ That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty; but this provision shall not apply to warrant officers commissioned under section twelve of this act:

* * * * *

And provided further, That nothing in this act shall operate to increase or reduce the pay of any officer now on the retired list of the Navy.

* * * * *

III.

ARGUMENT.

From the foregoing statutes it will be seen that while the procedure for the compulsory retirement of officers of both the Army and Navy for incapacity not resulting from incidents of the service are the same, there are material differences in the matter of pay to which officers in the two services are respectively entitled upon retirement. That is to say, an officer of the Army may be retired (1) on seventy-

¹ This proviso was repealed June 29, 1906 (34 Stats. 554).

five per centum of the pay of his rank, or (2) wholly retired from the service, as the President may determine; while an officer of the Navy can be retired only on (1) furlough or one-half of the pay to which he would have been entitled if on leave of absence, or (2) wholly retired from the service with one year's pay, as the President may determine, or (3) such officer may after retirement be transferred by the President, with the consent of the Senate, from the furlough to the retired pay list, where he would be entitled to receive one-half the sea pay of the rank held by him at the time of retirement. (R. S., sec. 1588; *Potts v. United States*, 125 U. S., 173; *United States v. Burchard*, *Ib.*, 176.)

The appellant contends that section 13 of the personnel act necessarily abolished these differences, and that as the Army statute gives to Army officers retired from active service 75 per cent of the pay of the rank upon which retired, irrespective of the cause, the naval officer was thereafter clearly entitled under the assimilating clause of that section to Army retired pay when retired for any cause whatever. (Brief, p. 11.)

THE QUESTION INVOLVED.

Thus it will be seen that the single question presented by this case is whether the special provisions of the prior law contained in Revised Statutes, sections 1454, 1593, and 1594, are inconsistent with and therefore repealed by the general terms of section 13 of the Navy personnel act.

This court had occasion to consider a similar question in the case of *Rodgers v. United States* (185 U. S., 83), and to there reject a construction of section 13 of the personnel act identical in principle with that now contended for in the claim at bar.

In that case the claimant, a rear admiral of the line of the Navy, who under section 1466, Revised Statutes, ranked with a major general in the Army, brought suit in the Court of Claims to recover an alleged balance of pay to which he claimed to be entitled under the personnel act. By section 7 of that act it was provided that the active list of the line of the Navy should be composed of eighteen rear admirals, seventy captains, etc., and

Provided, That each rear admiral embraced in the nine lower numbers of that grade [of which the claimant was one] shall receive the same pay and allowances as are now allowed a brigadier general in the Army.

And by—

SEC. 13. That after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army: *Provided*, That such officers when on shore shall receive the allowances but fifteen per centum less pay than when on sea duty.

The claimant contended first that the proviso in section 7 established a complete but temporary rule for the payment of the nine lower numbers in the grade of rear admirals and entitled them to the full pay given by the Army statute to a brigadier general without the 15 per cent reduction in pay for service on shore, and, second, that after the 30th of June, 1899, under and by virtue of the assimilating clause of section 13, all rear admirals became entitled to the pay and allowances of major generals in the Army, the proviso in section 7 with respect to the nine lower numbers being merely temporary and expiring on that day.

In overruling both of these contentions Mr. Justice Brewer, speaking for the court, said, pp. 87-89:

It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special.

* * * * *

In the light of this canon, how should these two sections be construed? Section 7 in effect abolishes the rank of commodore, at least so far as respects the active list of the line of the Navy, and lifts those in that rank to that of rear admiral. The attention of Congress was thus directed to such change, and the proper accompanying provisions in respect to salary and otherwise, and it declared that the lower nine rear admirals, they who were by the section lifted to that rank, should receive a particular salary. Clearly that was a special provision in respect to a matter to which the attention of Congress was at the time directed. If another statute had been passed at a subsequent or on the same day making general provision for the salaries of naval officers, clearly the canon to which we have referred would apply. *A fortiori*, when the subsequent general provision is in the same statute it should be held applicable. So, when in section 13, Congress prescribed a general rule for the salaries of naval officers, such general rule can not within the scope of this canon be understood as repealing the special provision in the prior section, but the special provision must be taken as an exception to and limitation of the general rule.

The same principle was applied by the Court of Claims in the case of *Elmer v. United States* (45 Court of Claims, 90), wherein it was held that a surgeon in the Navy dropped from the service for failure to pass his professional examinations for promotion was not entitled, by virtue of the assimilating clause of

the 13th section of the personnel act, to the one year's pay allowed by the Army statute to Army officers in similar cases.

So also in the case *Denig v. United States* (37 C. Cls., 383) it was held that a prior law authorizing the appointment of and providing higher annual pay for fleet engineers was not repealed by the personnel act, notwithstanding the provision of section 1 of the latter act, which in effect abolished the Engineer Corps of the Navy and transferred the officers thereof to the line of the Navy.

This court in *Petri v. Creelman Lumber Co.* (199 U. S., 487) had occasion to reaffirm the principle announced in the earlier case of *Rodgers v. United States, supra*.

There, by separate act, the State of Illinois was divided into certain Federal judicial divisions or districts, and the division in the northern district prescribed wherein certain suits should be brought, it being provided, however, that if two or more defendants resided in different divisions or districts the suit might be brought "in either in which either of the defendants may reside." The general judiciary act approved on the following day, March 3, 1887 (24 Stat., 552), declared that no suit should thereafter be brought "in any other district than that whereof the defendant was an inhabitant," and repealed all laws and parts of laws in conflict therewith.

The defendants successfully challenged the jurisdiction of the trial court upon the ground that being residents of the southern district they could not be

sued in the northern district of the State, claiming that the provision of the special act had been repealed by the general terms of the later act. This court reversed the judgment of the trial court, however, and in an opinion by the present Chief Justice said (199 U. S., 497):

It is elementary that repeals by implication are not favored, and that a repeal will not be implied, unless there be an irreconcilable conflict between the two statutes. And especially does this rule apply where the prior law is a special act relating to a particular case or subject and the subsequent law is general in its operation.

To hold, then, that the general terms of the act of 1887 repealed the special and particular provisions of the act of 1887, relating to the districts in Illinois, we must conclude that there was such conflict between the two that it can not reasonably be inferred that Congress intended that the two should coexist.

Since it is manifest in the case at bar that the prior law embodied in Revised Statutes, sections 1454, 1593, and 1594, was special in character relating to a particular class of naval officers, namely, officers compulsorily retired for incapacity not incident to the service, it necessarily follows from an application of the principle of the above cases, to quote the language of Mr. Justice Brewer in *Rodgers v. United States*, *supra*, that "when in section 13 Congress prescribed a general rule for the salaries of naval officers, such general rule can not within the scope of this canon be

understood as repealing the special provision in the prior section, but the special provision must be taken as an exception to and limitation of the general rule."

It is, therefore, quite obvious that appellant's counsel is wholly wrong in his assertion (brief, p. 13) that the decision of the court below is "at war with the uniform current of decision in this court as well as the Court of Claims." Certainly the cases cited do not support that assertion nor can we perceive that they have any application whatever to the issue here involved.

RETIRED OFFICERS' PAY NOT ASSIMILATED.

Aside, however, from the conclusion which necessarily follows from the application of the well settled canon of statutory construction in respect to special and general statutes, the correctness of the decision below is also apparent from the language of the assimilating clause of the 13th section itself, in which, as will be observed, no reference is made to retired officers. Indeed the very phrase "pay *and* allowances" by which the increased compensation was authorized may well be said to necessarily exclude them, since no officer in either the Army or Navy receives any "allowances" whatever on the retired list.

Furthermore, the first proviso to that section (repealed some seven years later by the act of June 29, 1906; 34 Stats., 554) declares "That *such* officers" (that is to say, commissioned officers of the line and

of the Medical and Pay Corps), "when on shore shall receive the *allowances* but fifteen per centum less pay than when on sea duty," thus affording an additional indication that the increased compensation provided was intended to apply to officers on the active list alone.

The same may be said as to the second proviso and in fact a reading of the whole section clearly shows the intention of Congress to have been that only officers on the active list should receive the same pay and allowances as officers of corresponding rank in the Army.

PROVISIONS OF THE PERSONNEL ACT RELATING TO
RETIRED PAY.

It is insisted, however, that the concluding proviso to section 13 of the personnel act, "That nothing in this act shall operate to increase or reduce the pay of any officers now on the retired list of the Navy," is a plain indication of congressional intent that officers retired afterwards should be paid according to the new pay table.

This contention, if conceded, lends no strength whatever to appellant's claim, for, as found by the court below, Lieutenant Hannum has been paid since retirement according to the new pay table; that is to say, one-half of the pay he would have received had he been on shore duty on the active list (Findings III and IV, Rec., p. 3), namely, pay corresponding to that of a captain in the Army, not mounted, with forty per cent longevity increase thereon, reduced by fifteen per cent for duty on shore, or a total compen-

sation on the active list of \$2,142, one-half of which is \$1,071.

But it is further argued that the pay an officer had been receiving prior to the date of his retirement on the active list is always taken as the starting point toward calculating his pay after retirement; that the annual pay being thus fixed by an Army statute the percentage fixed by that statute must necessarily be taken as the percentage to be given such officers as their pay after retirement; and, further, that "To hark back to the old pay statute in force before the passage of the personnel act to ascertain what percentage of his active pay the officer is to receive is an incongruity and contrary to the terms of the personnel act." (Brief, p. 15.)

SECTIONS 8, 9, AND 11 OF THE PERSONNEL ACT.

This argument, however, completely ignores the provisions of sections 8, 9, and 11 of the same act creating a new class of retired officers and prescribing a method by which a definite number should thereafter be annually retired.

Section 8 provides that officers of the line of the Navy in grades of captain, commander, and lieutenant commander, may by application first made to the Secretary of the Navy have their names placed on a list of "Applicants for voluntary retirement," and when at the end of any fiscal year the average number of vacancies for that year above and between the grades of commander and lieutenant (junior grade) have been less than a specified number, the President may in

the order of the rank of the applicants place a sufficient number on the retired list with the rank and three-fourths the sea pay of the next higher grade.

Section 9 provides, "That should it be found at the end of any fiscal year that the retirements pursuant to the provisions of law *now in force*, the voluntary retirements provided for in this act and casualties are not sufficient to cause the average vacancies enumerated in section 8 of this act," (our italics) the Secretary of the Navy shall appoint a board who shall "then select, as near as practicable after the first day of July, a sufficient number of officers from the above-mentioned grades as constituted on the thirtieth day of June of that year, to cause the average vacancies enumerated in section 8 of this act," who upon the approval of the President shall also be retired with the rank and three-fourths the sea pay of the next higher grade.

SEC. 11. That any officer of the Navy, with a creditable record, who served during the Civil War, shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade.

Thus it will be seen that the attention of Congress was directly drawn to the laws governing the retirement of officers of the Navy and that Congress in express terms reaffirmed "the provisions of law now in force" relating to that subject.

By those laws the pay of all officers retired for age or incapacity resulting from long and faithful service, or wounds or injuries received in the line of duty, or

from sickness and exposure therein, receive seventy-five per centum of the sea pay of their rank at the time of retirement, while all other officers on the retired list receive one-half the sea pay of the rank held by them at the time of retirement (R. S., section 1588), except officers retired on furlough pay for incapacity not of service origin, who receive only one-half the pay to which they would have been entitled if on leave of absence on the active list (sections 1454 and 1593).

Is it reasonable to suppose had Congress intended to reverse its long settled policy and to completely abolish these distinctions, thereby placing all officers on the retired list on an exact equality as to pay, no matter for what cause retired, that Congress would have failed to declare such purpose in clear and unmistakable language instead of leaving its intention to be determined from the general terms of section 13 of the personnel act?

To quote the language of the opinion in the court below:

We must therefore conclude that had Congress intended by their legislation to increase the pay of officers of the Navy on the retired list who were retired because of their own misconduct, as provided by said section 1454, they would have said so; and as the last proviso to said act expressly excluded officers on the retired list at the time the act was passed from the operation thereof, we can see no reason why officers retired since the passage of the act by reason of their own misconduct, as

in the case at bar, should not receive the pay provided for by section 1593, and especially as such has been the ruling of the executive departments having to do with such retirements since the act was passed (Rec., p. 5).

CONSTRUCTION OF LAW BY NAVY DEPARTMENT.

The accuracy of this latter statement of the court below respecting the ruling of the executive departments is challenged and certain "remarks" attached to "Navy and Marine Corps pay tables" are quoted to support counsel's assertion that since the passage of the personnel act "officers of the line and of the Medical and Pay Corps receive 75 per cent of the pay of their rank in all cases irrespective of the cause of retirement." (Brief, pp. 15 and 16.)

This assertion is wholly erroneous, as appears from the Official Register of the Navy for 1911 (page 180), which shows during the years covered by this claim (1900 to 1906), that in addition to the claimant, the following officers were "Retired for incompetency or disability proceeding from other causes not incident to the service, in conformity with section 1454 R. S.:"

One ensign (an officer of the line).

One assistant surgeon.

One chaplain.

One chief gunner (ranking with but after ensign)
and

One boatswain.

Counsel's assertion, moreover, is wholly misleading. It is true that officers of the line, Medical and Pay Corps, retired subsequent to the passage of the personnel act, received seventy-five per centum of pay

(salary and increase) of their rank, but this was not because of the fact that their pay on the retired list was assimilated to that of Army retired pay. It was simply because the officers referred to were retired under the provisions of the Navy law, for causes specified in paragraph 1, section 1588, Revised Statutes, which fixed their pay at seventy-five per centum of the pay of the rank held by them, respectively, at the time of their retirement. Such officers, when retired under paragraph 2 of the same section, or under section 1454, like all other officers of the Navy, as shown by the Navy Register, above quoted, were entitled only to one-half pay.

The officers referred to in Table 3 are officers of the Navy other than those of the line, Medical and Pay Corps; that is to say, officers of the Construction and Civil Engineer Corps, chaplains, and professors of mathematics, whose pay was not affected by the personnel act and who, therefore, continued to be paid at old Navy rates on the active list but who when retired received, under section 1588, three-fourths or one-half the sea pay (at old Navy rates) of the grade or rank which they held, respectively, at the time of their retirement according to the way in which retired.

Thus it will be seen that the cause of the distinction between the two classes of officers named in the pay tables referred to was due entirely to the fact that they received two different rates of pay on the active list and was not due to any assimilation of Navy retired pay to Army retired pay. In other words, the

rates of pay for all officers of the Navy on the retired list was governed by the same laws according to the manner in which each was respectively retired.

CONSTRUCTION OF LAW BY TREASURY DEPARTMENT.

It is true that in several decisions rendered shortly after the passage of the personnel act the Comptroller of the Treasury held that under the personnel act time on the retired list was to be counted in computing the pay of retired officers of the Navy. These decisions were, however, in effect overruled by the Court of Claims in the case of *Faust v. United States* (42 C. Cls., 94) and also by the comptroller in Eleventh Comptroller's Decisions, 419.

RETIREMENTS IN MARINE CORPS NOT ANALOGOUS.

Much emphasis is laid upon an opinion of the Attorney General rendered in 1878 concerning the rate of pay to which an officer of the Marine Corps, retired for incapacity not an incident of the service, was entitled, which it is claimed presented a question analagous to the one at bar.

In that case, however, as stated in the opinion, the retirement of officers of the Marine Corps was governed by sections 1622 and 1623 of the Revised Statutes, the first of which required officers of that corps to be retired in all cases and in the same manner and "with the same relative conditions in all respects" as officers of the Army are retired, except as otherwise provided by the latter section.

In view of the fact that there was but one rate of pay established by law for officers of the Army

retired under similar circumstances, namely, seventy-five per centum of the pay of the rank upon which retired (sec. 1274) and it appearing from a review of the facts involved that it was not the intention of the President to retire that officer wholly from the service, the Attorney General very properly held that Lieut. Wells was entitled to the pay established by law for retired officers of the Marine Corps notwithstanding a different rate of pay had been inadvertently named in the order by which he was retired. In the case at bar there is no basis for the assertion that a similar inadvertence exists, for here, as we have seen, the retirement of the officer was in strict conformity with the explicit provisions of the statute.

PRESENT RULE NOT INCONGRUOUS.

The final objection urged against the judgment below rests upon the assertion that it is impossible to apply section 1593, Revised Statutes, to the new rates of Navy pay provided by the personnel act because there is no "leave of absence" under the Army pay table (sec. 1261) as there was under the old Navy pay table (brief, p. 20). It is true that the effect of section 13 of that act was to abolish the old rate of leave or waiting-orders pay provided by the old Navy law (sec. 1556) for officers of the line and to that extent, therefore, this latter assertion may be said to be correct. But section 1593 does not direct nor require that officers placed on furlough shall receive one-half of "leave of absence" pay, provided

by the old Navy law, but expressly declares that they "shall receive only one-half of the pay to which *they would have been entitled if on leave of absence on the active list.*"

Now what was that pay? Turning to section 13 of the personnel act we find that for officers of the line on active duty it is the same pay as provided for officers of corresponding rank in the Army except that such officers *when on shore* shall receive the allowances, but fifteen per centum less pay than when on sea duty. It is, therefore, quite obvious that this latter sum (prior to the act of June 29, 1906, repealing the fifteen per cent reduction clause, 34 Stats., 554) was the pay to which an officer would have been entitled if on "leave of absence on the active list." And it is one-half of that sum which the appellant has received since the date of his retirement.

Not only is there no incongruity in the rule thus adopted for the computation of appellant's pay in this case but it conforms to the provisions of law relating to leaves of absence of officers of the Army as contained in Revised Statutes:

Sec. 1265. Officers when absent on account of sickness or wounds, or lawfully absent from duty and waiting orders, shall receive full pay; when absent with leave, for other causes, full pay during such absence not exceeding in the aggregate thirty days in one year, and half pay during such absence exceeding thirty days in one year. When absent without leave they shall forfeit all pay during such absence, unless the absence is excused as unavoidable.

REPEAL OF SHORE DUTY REDUCTION.

The statement of counsel is correct that the appellant has not received the benefit of the repeal by act of June 29, 1906 (34 Stat., 554), of the proviso of section 13 of the personnel act, "That such officers when on shore shall receive the allowances but fifteen per centum less pay than when on sea duty."

The benefit of this repeal was not claimed in the petition nor does the record show that it was brought in any manner to the attention of the court below. It is obvious, however, that can not be allowed under any circumstances in view of the explicit provisions of the act of August 5, 1882 (1 Supp. R. S., 377), declaring that—

Hereafter there shall be no promotion or increase of pay in the retired list of the Navy, but the rank and pay of officers on the retired list shall be the same as they are when such officers shall be retired.

CONCLUSION.

We submit that the judgment of the Court of Claims dismissing the petition in this case was correct and we ask that the judgment be affirmed.

JOHN Q. THOMPSON,

Assistant Attorney General.

FREDERICK DE C. FAUST,

Attorney.

